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In the Supreme Court of the United States

No. 69.
OCTOBER TERM, 1958.

LENORE RUSH,
Petitioner,

vs.

THE CITY OF MAPLE HEIGHTS,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI.

ARTHUR KRAUSE,
426 Engineers Bldg.,
Cleveland, Ohio,
Attorney for Respondent.

AUSTIN T. KLEIN,
ELMER R. VANEK,
Of Counsel.

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Respondent, The City of Maple Heights, respectfully requests this Honorable Court to deny a writ of certiorari to review an order and judgment of the Supreme Court of Ohio, rendered in this cause on the 26th day of February, 1958.

QUESTIONS PRESENTED.

1. Whether the record of the present case is sufficient to confer jurisdiction upon the United States Supreme Court under the provisions of Title 28 U. S. C. § 1257(3).

2. Whether the Ohio Supreme Court expressly reversed prior decisions of that court or whether it merely clarified the law as it already existed.

3. Whether petitioner was denied procedural due process by the decision of the Ohio Supreme Court in the present case.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

I. Jurisdiction.

Petitioner contends that jurisdiction in the instant case is conferred upon the Supreme Court of the United States by virtue of the provisions of Title 28, Section 1257(3) of the United States Code.

Title 28 U. S. C. § 1257(3) provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

In order to bring a case before the United States Supreme Court under this section it is well settled that the Federal right claimed to have been violated must have been set up and adjudicated against the claimant by the judgment of the State court, *Cleveland Railway Co. v. Cleveland, Ohio*, 235 U. S. 50. The Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to a determination of the cause, that the Federal question was actually decided, or that the judgment as rendered could not have been given without deciding it. *Southwestern Bell Telephone Co. v. State of Oklahoma*, 303 U. S. 206; *People of the State of*

New York ex rel. Consolidated Water Co. of Utica v. Maltbie, 303 U. S. 158.

Thus, the mere assertion by the Petitioner that a Constitutional right has been violated is not sufficient to give the United States Supreme Court jurisdiction to review a decision of a state Supreme Court. There must be a real and substantial controversy of the required character which deserves serious attention. *U. S. Fidelity and Guaranty Co. v. State of Oklahoma*, 250 U. S. 111. In the case of *Bothwell v. Buckbee-Mears Co.*, 275 U. S. 274, it was held that a claim not asserted in the state courts will not be considered on certiorari to the United States Supreme Court.

In the instant case no Federal question was raised at any stage of the proceedings in the courts of the State of Ohio. Nor was it necessary for the state courts to rule on any Federal questions in this case, none being involved from the facts or the decisions rendered. Since the United States Supreme Court will not undertake to review what the courts below did not decide, the Petition for a Writ of Certiorari should be denied.

II. Action of the Ohio Supreme Court.

The decision of the Ohio Supreme Court in the instant case did not overrule any previous decisions of that Court so as to deny the Petitioner a cause of action.

Prior to 1945, the common law in Ohio was that upon the happening of an accident followed by personal injury and property damage there was only one cause of action, and, if a plaintiff split this cause of action and sued separately for either personal injury or property damage, a judgment upon the first filed and tried case, whether for or against the plaintiff, became a bar against a subsequent

suit for damages brought by the same plaintiff for the other damages allegedly sustained. Then, in 1945, the Ohio Supreme Court decided the case of *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321. In that case the plaintiff was involved in an automobile accident and assigned his entire claim for property damage to an insurance carrier with whom he had a $50 deductible policy of collision insurance. The insurance carrier brought an action as subrogee of the plaintiff's cause of action for property damage. The Ohio Supreme Court held that an insurance carrier which has paid a property damage claim for injury to its assured's automobile may, as subrogee, maintain an action for reimbursement against the party who wrongfully caused the damage, independent of any claim of the owner for personal injuries growing out of the same accident. The Court further held that such act and procedure do not constitute the splitting of a cause of action.

In the *Vasu v. Kohler* case for personal injuries the Ohio Supreme Court held that the judgment in the property damage case in which the plaintiff, Vasu, had not been a party, was not a bar because the plaintiff therein was not a party to the first suit for property damage and, moreover, an Ohio statute specifically permitted a splitting since the *statute* provided that a cause should be brought by the real party in interest. The Court held that the assignment of the property damage claim to the insurance company transferred the plaintiff's interest therein and thereafter plaintiff did not participate in the first action in such a manner as to become, in effect, a party. Thus, circuitously, the Ohio Supreme Court created an *exception* to the ban on splitting causes of action without changing the original law. There was however some verbiage therein which did say that damage to property gives rise to a separate cause of action from damage to the person.

After the Ohio Supreme Court decided the *Vasu* case, it soon discovered that the ruling had taken on greater meaning than it had originally intended. Thus, when the opportunity to distinguish the *Vasu* case presented itself, the Supreme Court quickly did so.

In the 3rd Syllabus of *Markota v. East Ohio Gas Company*, 154 Ohio St. 546, the Court stated:

> "Although a right of action may arise at each time that damage covered by a single indemnity agreement occurs, a plaintiff may maintain only one action to enforce any such rights existing at the time such action is commenced. (*Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 30 Ohio Opinions 542, distinguished.)"

In the body of the opinion the Court went on to say:

> "It should be noted, however, that the plaintiff, in the *Vasu* case, had not been a party to the action brought by his indemnitor against the defendant; and, as indicated by paragraph eight of the syllabus in the *Vasu* case, the plaintiff was not, therefore, bound by the judgment against his indemnitor who had sought to recover from that defendant the portion of the plaintiff's claim assigned to such indemnitor."

Perhaps it should be noted that in the indemnification agreement in the *Markota* case the elements of damage would have sounded in tort. Nevertheless, the Court implied that the rule that only one action can be maintained to enforce all elements of damage arising out of a single act would be the same even in the absence of an indemnity agreement.

Later, in the case of *Mansker v. Dealers Transport Company*, 160 Ohio St. 255, the Supreme Court again explained and restricted its holding in the *Vasu* case:

> "Actually, the fourth paragraph of the syllabus in the Vasu case means and was intended to mean that where a second action is instituted upon a claim, demand or cause of action *different* from that involved in the first action, the judgment in the first action is not a bar to the prosecution of the second, but operates only as an estoppel with regard to points in the first action."

In the *Mansker* case, the plaintiff first brought an action for property damage and, being unsuccessful in that action, sought to bring an action for personal injuries. Note that in these cases, the plaintiff and defendant were the same persons in both actions. Thus, in the time between the *Vasu* case and the instant case, the Supreme Court of Ohio was not presented with a situation in which a plaintiff split his cause of action for personal injuries and property damage, resulting from a single tortious act, and leading to a judgment in his favor. Nowhere in the reported decisions of the Supreme Court of Ohio since the *Vasu* case has there been any definitive statement that where personal injuries and property damage result from a single tortious act two causes of action arise which can be sued on separately by a single plaintiff. As a result of the *Markota* case, *supra*, the *Vasu* case (and its explanation in the *Mansker* case) must be confined to its facts, and Petitioner's contention that the Ohio Supreme Court overruled its previous decisions without notice is without merit, and no vested rights were taken from the Petitioner by the Court's holding in the instant case. Thus, there is no ground upon which Petitioner can predicate a Petition for a Writ of Certiorari.

Even if the Ohio Supreme Court's holding in the instant case is considered as overruling a previous decision, courts have the power to do so, for to make *stare decisis* always paramount would be to deprive the law of its

capacity for growth and adaptation. *Kabatchnik v. Hanover-Elm Building Corporation*, 328 Mass. 341, 103 N. E. 2d 692.

The doctrine of *stare decisis* is never mandatory, but at most possesses only persuasive effect, and the courts have the right and duty to remove from the body of the law such former obstructive opinions as are clearly erroneous, and confusing and conflicting, as well as contradictory of ancient and well settled rules. *Hanks v. McDanell*, 307 Ky. 243, 210 S. W. 2d 784. Whether or not a previous holding shall be adhered to or modified or overruled is a question within the discretion of the court under the circumstances of the case under consideration. *Otter Tail Power Company v. Von Bank*, 72 N. D. 497, 8 N. W. 2d 599.

Thus, whether the holding of the Ohio Supreme Court in the instant case is deemed to be an explanation and clarification of the law as it existed, or whether the holding is considered as overruling previous decisions, the Petition for a Writ of Certiorari should be denied, since the courts are empowered to follow either course of action.

In addition, matters affecting the remedy are governed by the law of the forum, and a decision of a state court on a matter of state pleading or practice is, therefore, not reviewable by the United States Supreme Court. *Central Vermont Railway Company v. White*, 238 U. S. 507.

III. Procedural Due Process.

The Ohio Supreme Court's holding in the instant case has not denied Petitioner procedural due process. Petitioner's claim here is without merit, for if the view that the holding in the instant case merely explained and clarified the law as it existed is taken, then, the matter of due process is not an issue and can be disregarded.

Moreover, if the view that the instant case overruled previous decisions is taken, Petitioner's claim is still without merit. There is no constitutional objection to a court's making a choice for itself in overruling an earlier decision, whether the new rule declared by it shall operate prospectively only or apply also to past transactions.

In Petitioner's Brief, on page 7, Petitioner contends that a *legislature* may not enact retroactive legislation. This contention is inapplicable here, for although it is well settled that under certain circumstances even a legislature may enact retroactive legislation, this principle is not applied to judicial decisions. In the leading case of *Great Northern Railway Company v. Sunburst Oil and Refining Company*, 287 U. S. 358, it was held that the highest court of a state in overruling an earlier decision may, consistently with the due process clause of the Fourteenth Amendment, make a choice for itself whether the new rule declared by it shall operate prospectively only, or apply also to past transactions, and the alternative is the same whether the subject of the new decision is common law or the construction of a statute.

In the *Great Northern* case, *supra*, Justice Cardozo said:

> "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward."

In the case of *Durham v. United States*, 214 F. 2d 862, it was also held that decisions may be applied retroactively or prospectively.

Thus, it is clear that Petitioner was not denied procedural due process.

CONCLUSION.

Respondent contends that the record of the instant case is insufficient to confer jurisdiction upon the United States Supreme Court under the provisions of Title 28, Section 1257 (3) of the United States Code; that whether the Ohio Supreme Court expressly reversed prior decisions of that court or merely clarified the law as it already existed, it had a right to choose either course of action; and that the decision of the Ohio Supreme Court in the instant case did not deny Petitioner any rights secured by the Fourteenth Amendment.

Accordingly, this Honorable Court should deny the Petition for a writ of certiorari.

Respectfully submitted,

ARTHUR KRAUSE,
Attorney for Respondent.

AUSTIN T. KLEIN,
ELMER R. VANEK,
Of Counsel.